UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

IN RE: VALSARTAN, LOSARTAN, AND IRBESARTAN PRODUCTS LIABILITY LITIGATION **This document relates to all actions.**	MDL No. 2875 Civil No. 19-02875 (RBK/SAK) Hon. Robert B. Kugler, U.S. District Court Judge

DEFENDANTS' (PROPOSED) SURREPLY IN FURTHER OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION OF THIRD-PARTY PAYOR CLAIMS

Defendants respectfully submit this brief surreply to address certain new arguments raised by the Third-Party Payor ("TPP") Plaintiffs in their Reply Brief in support of their Motion for Class Certification.

The TPP Plaintiffs' claims cannot proceed on a classwide basis due to all the state-law variation issues addressed in Defendants' prior briefing and in Defendants' (Proposed) Surreply in Opposition to Plaintiffs' Memorandum of Law in Support of Their Motion for Class Certification of Consumer Economic Loss Claims, submitted herewith. In addition, Plaintiffs' effort to brush aside all of Defendants' arguments regarding factual variations within the class on the ground that literally nothing matters because Plaintiffs are proceeding on a theory that "[t]the contaminated VCDs at issue have no economic value . . . and this absence of value is common to all TPPs" (TPP Reply at 3 (ECF 2058)), misinterprets the applicable facts and law.

First, none of the authorities cited by Plaintiffs supports the novel proposition that a plaintiff can satisfy the requirements of Rule 23 simply by declaring a product worthless, regardless of the defendants' arguments and the law. Plaintiffs cite *Debernardis v. IQ Formulations, LLC*, in which the court allowed claims to proceed past the ***motion to dismiss*** stage based on a theory that the plaintiffs had "plausibly alleged that they suffered an economic loss" because the product at issue "w[as] worthless." *See Debernardis v. IQ Formulations, LLC*, 942 F.3d 1076 , 1080, 1085 (11th Cir. 2019) (noting that the court "accept[s], at least at the motion to dismiss stage, that a dietary supplement that is deemed adulterated and cannot lawfully be sold has no value"). At class certification, however, the Court must go ***beyond*** the pleadings to determine whether or not "proof of the essential elements of the cause of action requires

individual fact finding."[1] *In re Thalomid & Revlimid Antitrust Litig.*, No. 14-6997, 2018 WL 6573118, at *11 (D.N.J. Oct. 30, 2018) (citation omitted); *see also In re BP p.l.c. Sec. Litig.*, No. 10-md -2185, 2013 WL 6388408, at *14 (S.D. Tex. Dec. 6, 2013) ("[A] motion to dismiss must be decided on the allegations in the pleadings, while at class certification the [c] ourt must look beyond the pleadings to determine whether a preponderance of the evidence indicates that common questions of fact or law will predominate over individualized questions during the course of the litigation."). Indeed, in contrast to a motion to dismiss, where the Court is required to view the evidence in the light most favorable to the plaintiff, such an approach constitutes reversible ***error*** in the context of deciding a motion for class certification. *See Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1233 (11th Cir. 2016) (it is error to view "'evidence in the light most favorable to' the party seeking class certification") (citation omitted).

Plaintiffs' reliance on *Blue Cross Blue Shield Ass'n v. GlaxoSmithKline LLC*, 417 F. Supp. 3d 531 (E.D. Pa. 2019), is misplaced for similar reasons. There, the court denied the defendant summary judgment in a case alleging that individual TPP plaintiffs overpaid for allegedly misrepresented prescription drugs because "[t]he question of whether [p]laintiffs have produced sufficient evidence to prove their injury . . . requires the resolution of genuine issues of material fact and turns on the credibility and weight afforded to the parties' witnesses." *Id*. at 554-55 (emphasis added). The case was not a proposed class action, and the court did not hold

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[1] *In re Gerber Probiotic Sales Practices Litigation*, No. 12-835 (JLL), 2013 WL 4517994 (D.N.J. Aug. 23, 2013), also cited by Plaintiffs, is even more inapposite. There, the court ***dismissed*** claims based on the allegation that baby formula did not have all of its advertised benefits. *Id*. at *1. While the court noted in dicta that the plaintiffs had adequately alleged an injury in fact, the plaintiffs' claims there were based on the allegation that the plaintiffs "paid a premium for the Products at issue based on false, deceptive, and misleading representations," *id*. at *5-6, not that the products were entirely worthless.

or suggest that plaintiffs' claims were appropriate for class treatment or could be resolved based on so-called common evidence of "worthlessness."

The relevant evidence for determining whether each TPP sustained an injury as a result of paying for VCDs will vary based on, among other things, the level of impurity (if any) in the medication purchased, the therapeutic benefit the medication provided, and the costs TPPs would have incurred for VCD alternatives. (*See* TPP Opp'n at 9-10 (ECF 2010).) In their Reply, Plaintiffs attempt to distinguish *In re Actiq Sales & Marketing Practices Litigation*, 307 F.R.D. 150 (E.D. Pa. 2015)—in which the court refused to certify a proposed class of TPPs for reasons similar to those argued by Defendants here—on the ground that the VCDs in this case were "adulterated, and thus unlawful for sale." (TPP Reply at 6.) Defendants vigorously disagree with that allegation for the reasons set forth in their opposition to Plaintiffs' Memorandum of Law in Support of Their Motion for Class Certification of Consumer Economic Loss Claims, but even if it were the case that all VCDs were "unlawful for sale," Defendants would still be entitled to present evidence that certain TPPs did not suffer any economic loss because they would have had to pay for alternative drugs or cardiac treatments that cost more. (*See* TPP Opp'n at 11 (citing cases).) As the U.S. Supreme Court has noted, "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (citations omitted); *see also Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."); *In re Niaspan Antitrust Litig*., 464 F. Supp. 3d 678, 719 (E.D. Pa. 2020) (declining to certify proposed

class, noting that "defendants would be entitled to present individualized evidence to a jury that certain Niaspan purchasers are uninjured"); *Diabate v. MV Transp., Inc.*, No. 14-857, 2015 WL 4496616, at *14 (E.D. Pa. July 20, 2015) (finding class certification inappropriate because defendants were "entitled to assert" defenses as to individual class members and "[c]ertifying the class would deprive them of [that] opportunity").

Second, Plaintiffs argue in their Reply that whether some proposed class members would have paid the same amount or ***more*** for VCD alternatives if they had not purchased VCDs is irrelevant to their claims for breach of warranty, because the measure of damages for breach of warranty is the difference between the value of the good as accepted and the value as warranted. (TPP Reply at 5.) But even if that were the correct measure of damages for all of the claims at issue under the varying applicable states' laws, which Plaintiffs have made no effort to demonstrate, individualized evidence would still be required to determine whether each proposed class member was injured. While Plaintiffs assert that the value of VCDs as accepted "is zero" (*id.*), Defendants dispute that allegation and—as noted above—are entitled to present evidence that even if the presence of impurities reduced the value of VCDs, the actual value of the specific VCDs for which each proposed class member paid would vary based on whether those VCDs contained impurities, and at what level, as well as the health benefits those VCDs provided to the proposed class member's subscribers. In these circumstances, class certification is inappropriate. *See Jackson v. Se. Pa. Transp. Auth.*, 260 F.R.D. 168, 197 (E.D. Pa. 2009) (noting that the presence of "individual issues makes class determination more onerous than efficient" where "[d]efendant would be entitled to raise individualized defenses").

For these reasons, Plaintiffs' "worthlessness" theory does not eliminate the need for individualized proof, precluding a finding of predominance or typicality.

CONCLUSION

For the foregoing reasons, and those set forth in Defendant's Memorandum in Opposition to Class Certification, the TPP Plaintiffs' motion should be denied.

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Respectfully submitted,

By: */s/ Jessica D. Miller*

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2022, I electronically filed the foregoing Defendants' (Proposed) Surreply in Further Opposition to Plaintiffs' Motion for Class Certification of Third-Party Payor Claims with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

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